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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 891

RUTH E. LAYTON, FARMERS UNION, AND LAYTON SUGAR COMPANY, A CORPORATION,

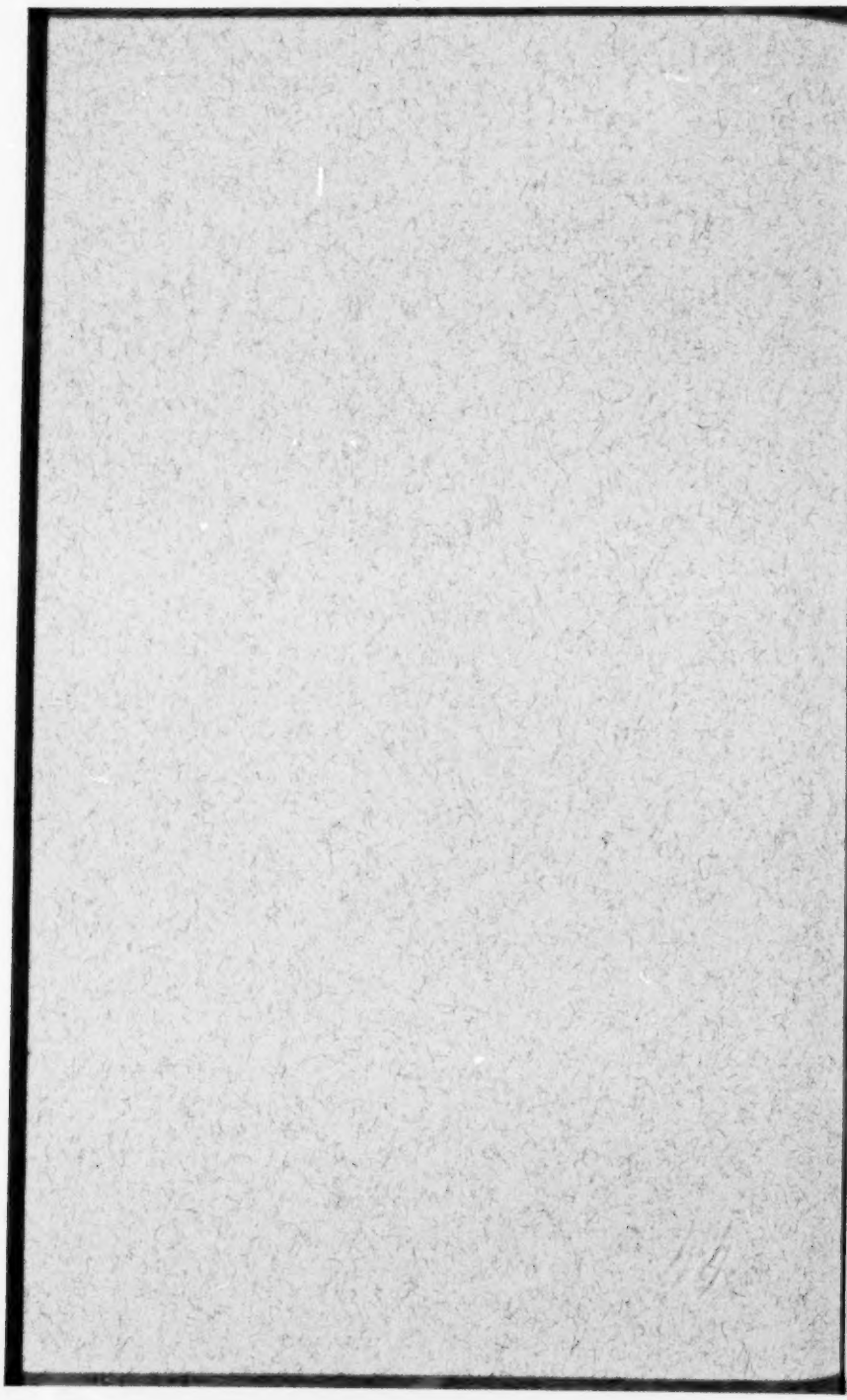
Petitioners,

vs.

WILLIAM J. THAYNE, DAVIS COUNTY BANK, WALTER WRIGHT, MORRISON-MERRILL AND COMPANY, PRESTON PARKINSON AND COT HEADLUND, DOING BUSINESS AS RUDY AND HEADLUND, AND CLIFTON B. LAYTON, DEBTOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF.

J. D. SKEEN,
E. J. SKEEN,
Counsel for Petitioners.



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PETITION FOR WRIT OF CERTIORARI.

The petition of Ruth E. Layton, Farmers Union, and Layton Sugar Company, a corporation, respectfully shows to the Court:

That petitioners are creditors of Clifton B. Layton, debtor. That on the 19th day of April, 1933, the said Clifton B. Layton filed a petition in the United States District Court for the District of Utah after approval, praying for relief under Section 75 of the Bankruptcy Act. There was attached to the said petition schedule "A", showing four creditors with secured claims aggregating $18273.00 and

eleven creditors having unsecured claims aggregating $7720.00; and schedule "B" showing two tracts of land of 31½ acres and 27½ acres, respectively.

On the 22nd day of April, 1935, the said debtor filed a petition for relief under Section 75 (s) of the said act, and on the 23rd day of April, 1935, he was adjudicated a bankrupt and said matter referred to a referee in bankruptcy. The proceeding under Section 75 (s) was dismissed because of the statute being held unconstitutional.

On December 16, 1935, the debtor executed and delivered to the Davis County Bank of Davis County, Utah, a mortgage covering a part of the land scheduled, to secure payment of a note for $5000. On December 27, 1935, the debtor executed and delivered to the Utah Rural Rehabilitation Corporation a mortgage for the sum of $3600, covering the same land to secure payment of a note for the same amount. On February 25, 1936, the debtor executed and delivered to William J. Thayne, a note for $2470, and a mortgage covering the same land, to secure payment of a note for a like amount. On November 13, 1936, a judgment was entered against the debtor in the sum of $360, and on February 1, 1937 suit was instituted in the District Court for Davis County, Utah, against the debtor by William J. Thayne to foreclose the mortgage given February 25, 1936. On February 15, 1937, the debtor conveyed the land to his wife.

On July 14, 1937, a petition was filed in the Federal District Court by William J. Thayne, for leave to continue the prosecution of a suit against the debtor filed February 1, 1937. No notice of hearing upon the petition was given, and on the 31st day of July, 1937, a minute entry was made authorizing the prosecution of the suit. On January 20, 1939, the sheriff of Davis County issued a certificate of sale of debtor's real estate under decree of foreclosure entered in the Thayne suit, and on April 2, 1940, a sheriff's deed

was issued to William J. Thayne upon the certificate of sale.

On the 1st day of December, 1938, a petition was filed by Thayne reciting the filing of the petition for relief under Section 75 of the Bankruptcy Act, the entry of an order authorizing Thayne to proceed with the foreclosure suit, the entry of a decree of foreclosure, that the debtor was not a farmer, that no offer of composition and extension was made, and that the proceeding was for the purpose of delaying creditors, and praying for an order dismissing the proceeding filed for relief under Section 75. No notice of hearing of the petition was given to creditors. An order was issued and served upon the debtor alone, requiring him to show cause why the proceeding should not be dismissed.

On December 10, 1938, the debtor, Thayne, and one creditor appeared by their attorneys and it was thereupon ordered "that the case be and was hereby dismissed."

On January 11, 1940, the Utah Wool Marketing Association, successor in interest of an unsecured creditor, having a claim of $2200, filed a petition for an order setting aside the order of dismissal and reinstating the proceeding, and on January 27, 1940, the petitioners herein filed a petition for an order requiring all persons having dealings with the debtor, after the filing of the petition, April 19, 1933, and all persons receiving money, property, notes, mortgages, or evidence of indebtedness, or asserting claims or liens upon the property of the debtor to appear and show cause why the court should not make an order setting aside the order of dismissal dated December 10, 1938, setting aside and annulling the notes and mortgages and other liens given by the debtor, and making such other and further orders as the court should deem proper in the further administration of the proceedings under the provisions of Section 75 of the Bankruptcy Act. Notice was given, a hearing was had, and thereupon the District Court made findings reciting the filing of the petition for relief under Section 75 of the Bank-

ruptcy Act, the filing of a petition for adjudication under subsection (s) of the Bankruptcy Act, the fact that the said petition under subsection (s) was dismissed because of the judgment of this Court declaring subsection (s) unconstitutional, the conveyance by the debtor of his property to his wife; "that during the year 1935 and at all times since said date the said debtor, Clifton B. Layton, was not primarily bona fide personally engaged in producing products of the soil". That the Conciliation Commissioner, during the years 1935 and 1936 in conjunction with the debtor, purportedly acting under Section 75, made various compositions and compromises with certain of his lien creditors, that the Conciliation Commissioner on the 26th day of February, 1937, made his report to the court recommending the dismissal of the proceedings and that the proceedings were dismissed on December 10, 1938. "That the debtor at no time since April 19, 1933 ever complied with the requirements of Section 75 so far as to entitle him to file under subsection (s) or that at no time did he ever effect a composition with his creditors and that he declined in open court to join in the prayer to vacate and set aside the order of dismissal." The court concluded that the petitioners were not entitled to have the order of dismissal vacated or set aside and that their petition should be dismissed and entered judgment of dismissal.

An appeal was taken to the United States Circuit Court of Appeals for the Tenth Circuit, in which court the following assignments were made:

> "1. That the court was without jurisdiction to make and enter an order of dismissal of the above entitled proceeding on December 10, 1938 for the reason that appellants had no notice of the hearing upon the said motion to dismiss.
>
> 2. That the court erred in concluding and adjudging that appellants were not entitled to have said proceed-

ing reinstated and the property of the said debtor held subject to the sole jurisdiction and control of the court of bankruptcy and subject to the payment of debtors' creditors including appellants as provided for in Section 75 of the Bankruptcy Act.

3. That the court erred in holding that the petitioners by their long delay in filing their petitions had been guilty of laches.

4. That the court erred in making and entering an order on December 10, 1938, purporting to dismiss said proceedings without the giving of notice as required by Section 58 and 59 of the Bankruptcy Act and that the order of December 10, 1938 having been made without notice to creditors including these appellants was ineffective in terminating the jurisdiction of the court over the property of the debtor and void by reason of which the court erred in denying appellants relief under their petitions for the reinstatement of said proceeding and the administration of the property of the debtor in the Bankruptcy court as required by law."

said matter was argued and submitted and on the 27th day of December, 1940. The Circuit Court of Appeals handed down an opinion holding that the original proceeding was dismissed and the jurisdiction over the debtor terminated when subsection (s) was declared unconstitutional. The opinion of the court is published in 116 F. (2d) No. 3, page 769.

The following questions are presented by this petition:

I.

Did the jurisdiction of the District Court over the debtor and his property terminate as to creditors, by the filing of a petition for adjudication in Bankruptcy under the provisions of the void subsection (s) of Section 75 of the Bankruptcy Act.

II.

After a proceeding is initiated under Section 75 and the exclusive jurisdiction of the Federal court attaches to the debtor and his property, have creditors a right to have the proceeding continued for the protection and preservation of the property of the debtor to the extent, as least of preventing the debtor from creating liens upon his scheduled property for the benefit of favored creditors or conveying or otherwise disposing of the property to the prejudice of other creditors.

III.

Does Section 75, subsection (p), reading:

> "All such property shall be under the sole jurisdiction and control of the court in bankruptcy and subject to the payment of the debtor farmer's creditors as provided for in Section 75 of this Act."

mean that the jurisdiction of the court, regardless of the conduct of the debtor, continues for the protection of the creditors and the administration of the property until the proceeding is dismissed in the manner provided for the dismissal of proceedings in voluntary or involuntary Bankruptcy under Section 58 (a-7) and 59 (g) of the General Bankruptcy Law.

IV.

Did the District Court, in continuing to exercise jurisdiction over the debtor and his property, after the dismissal of the proceeding initiated under the void subsection (s) of Section 75, even though erroneous, create a situation prejudicial to creditors, which could be remedied by the District Court alone by orders cancelling the conveyance from the debtor to his wife and removing mortgage liens upon the property given while the jurisdiction of the court over the

debtor and his property was being asserted under the provisions of Section 75 of the Bankruptcy Act.

The writ of certiorari should be granted for the following reasons:

1. That the judgment of the Circuit Court of Appeals disregards the fundamental right of creditors to have the property subject to the exclusive jurisdiction of the District Court, preserved for the benefit of all creditors and ultimately distributed in accordance with their rights and with the preferences created before or after the jurisdiction of the court attached eliminated.

2. That the District Court and the Circuit Court of Appeals have failed to give any force or effect, whatsoever, to Section 75, subdivision (p) of the Act, reading:

> "All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

The lower courts have wholly disregarded Section 75 (n), reading:

> "* * * In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

And Section 58 (a-7) and 58 (g) of the General Bankruptcy Act, reading:

> Section 58 (a-7): "Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors of (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act."
>
> Section 59 (g): "A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in section 58 of this Act."

3. The recognition of the rights of creditors in proceedings under Section 75 is the utmost general importance and such rights can be safeguarded and protected only by the correction of the erroneous rulings and judgments of the lower courts.

4. Because the judgment of the Circuit Court of Appeals is contrary to the letter and spirit of the statute as interpreted in:

John Hancock Mutual Life Insurance Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 176;

Wright v. *Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736.

WHEREFORE, petitioners pray that the writ of certiorari to the Circuit Court of Appeals of the Tenth Circuit issue herein.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 891

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Petitioners,

vs.

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SUPPORTING BRIEF ON QUESTIONS OF THE JURISDICTION OF THE SUPREME COURT TO ISSUE WRIT OF CERTIORARI.

This Court is authorized to grant the writ of certiorari by the express provisions of section 347 of the Judicial Code, reading:

> "In any case, civil or criminal, in a circuit Court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to re-

> quire by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The petitioners (creditors of the debtor) asserts a right to pursue proceedings under a Federal Statute and that right has been denied.

The right of creditors to have the property of the debtor held subject to the exclusive jurisdiction of the Federal District Court is given by Section 75 (p) of the Bankruptcy Act, which reads:

> "All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

The petitioning creditors have been denied the fundamental right to have the property of the debtor, which became subject to the exclusive jurisdiction of the court, preserved and kept free from liens, while so held by the court, and the further right to have the conveyance and the mortgages given while the property was subject to the jurisdiction of the court, removed before the surrender of the jurisdiction of the court over the debtor and his property by the dismissal of the proceeding. In order that the petitioning creditors might have their day in court to assert their rights before the dismissal of the proceeding, they were entitled under the express provisions of the statute and under the constitution, to notice of proposed dismissal of the proceeding.

So far as known, the specific question as to the rights of creditors under Section 75 of the Bankruptcy Act, has not been before this Court. *Bernards* v. *Johnson,* Ninth Cir-

cuit Court of Appeals, 103 F. (2d) 567, now before this Court, does not appear to support the judgment of the Circuit Court of Appeals for the reason that the rights of creditors to have the proceeding continued for the preservation of the property and for the orderly administration of the same, was not before the court. The debtor alone was concerned with the reinstatement of the proceedings.

This Court has repeatedly granted certiorari in cases involving Section 75 of the Bankruptcy Act:

Kalb v. *Feuerstein,* 308 U. S. 433, 84 L. Ed. 370;

John Hancock Mutual Life Insurance Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 176;

Union Joint Stock Land Bank v. *Byerly,* 310 U. S. 1-16, 84 L. Ed. 1041;

Borchard v. *California Bank & Trust Company,* 310 U. S. 311, 84 L. Ed. 1022;

Wright v. *Union Central Life Insurance Co.,* —— U. S. ——, 85 L. Ed. 166.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 891

RUTH E. LAYTON, FARMERS UNION, and LAYTON SUGAR COMPANY, a corporation,

(APPELLANTS BELOW) PETITIONERS,

vs.

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(APPELLEES BELOW) *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AND BRIEF.

This statement supplements petitioners' statement.

On this petition, there is cited authority, for the proposition, that this Court has the "power and authority" to grant certiorari, and has done so in some cases to review decisions of Circuit Courts of Appeal involving the bankruptcy statutes. This may be conceded. No authority is cited in support of the contention that certiorari should be here granted.

The petitioner does suggest (p. 8) as a too general reason for granting the petition that:

> "The judgment of the Circuit Court of Appeals is contrary to the letter and spirit of the statute as interpreted in:
>
> *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 84 L. Ed. 176;
>
> *Wright v. Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736."

There is manifestly no similarity between those cases or the matters discussed and the case before the court. In the first case the court held that the debtor had a right upon failure to effect a settlement under Section 75 to be adjudged a bankrupt in the manner provided by subsection (s) of Section 75 without a showing of good faith in the attempted settlement.

The other case simply held, for the first time, that the new subdivision (s) enacted August 28, 1935 was constitutional, as against the claim of a secured creditor, that he was deprived of his property without due process of law. Neither of these cases involves any question of the rights of general creditors where the debtor petitions for bankruptcy under the old subsection (s).

In matters of review of decisions of Circuit Courts, rule No. 38 of the Supreme Court rules, Par. 5, recites that:

> "A review on Writ of Certiorari is not a matter of right, but of sound discretion and will be granted only where there are special and important reasons therefor."

Section "B" then states the character of reasons which petitioner must present, and the petition here shows none of these.

One of the reasons is stated to be where a Court of Appeals "has decided an important question of Federal Law which has not been, but should be settled by this Court." This is the only stated reason that could be here involved.

It is the one petitioner apparently attempts to come under by the statement (p. 10) that:

> "So far as known the specific question as to the right of creditors under Section 75 of the Bankruptcy Act has not been before this court."

It is obvious that it is not, and cannot be, before this Court on this petition. It is also obvious that the Circuit Court of Appeals did not decide this "question of Federal Law". The question that the Circuit Court did decide has been settled by this court and that question was determinative of the issue presented to the Circuit Court of Appeals. No question of creditors or notice to creditors is involved in the decision.

The Circuit Court of Appeals in its decision here (116 Fed. (2d) 796) recited that the bankrupt filed on April 19, 1933 a petition for relief under Section 75 Subs. (a) to (r) of the Bankruptcy Act, 11 U. S. C. A., Sec. 203. That on April 23, 1935, to use the language of this court in:

> *Union Joint Stock Land Bank vs. Byerly,*
> 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041,

the petitioner

> "abandoned proceedings under sections (a) to (r) of Sec. 75 and filed an amended petition to be adjudged a Bankrupt pursuant to Sec. 75 (s)."

That such an amended petition was filed here is recited by the petitioner (R. p. 6) and was followed by a dismissal of such amended petition by the District Court after certain provisions of the Bankruptcy Act were held unconstitutional. The creditor never filed a petition to be reinstated. That this was an abandonment which the bankrupt had a right to make is indicated by the language of Sec. 75 (s) both as originally enacted and as amended, and also by the decisions of this Court in the case just quoted and cited and on this the Circuit Court of Appeals also cited in its opinion,

> *Hardt, vs. Kilpatrick,*
> 91 Fed. (2d) 875 (9 C. C.), and
>
> *Bernards vs. Johnson,*
> 103 Fed. (2d) 567 (9 C. C.).

On this point there appears to be no conflicting Circuit Court of Appeals decisions and the decisions cited are in harmony with the decisions of this Court.

After such dismissal, the bankrupt not only failed to file for reinstatement under the amended Sec. 75 (s), but refused to do so. (See Findings, R. p. 23).

The Circuit Court here held on this, following and citing *Union Joint Stock Land Bank vs. Byerly,* supra, that the bankrupt had not been in bankruptcy since the dismissal of his petition under Sec. 75 (s) May 27, 1935, and therefore the creditors petitions filed in 1940, to have vacated an order of dismissal entered December 10, 1938, were properly denied.

No question of the right of a creditor to obtain a reinstatement of Bankrupt under 75 (s), as amended, is involved or decided. No question of the right of creditors to control the bankrupt in filing an amended petition to abandon Sec. 75 (a) to (r) is here presented. The bankrupt was and is entirely out by his own authorized conduct. This is settled by the decision in Union Joint Stock Bank case, supra.

QUESTION OF NOTICE TO CREDITORS IS A MOOT QUESTION.

This objection could probably stop here. We point out, however, that under the record brought up here, it is further demonstrated that anything that might be decided with relation to these unsecured creditors in this case would be a purely moot proposition. It could avail these creditors nothing. The effort of the creditors here could only be an attempt to procure something out of the forty (40) acres of farm property covered by the Findings and by the Stipulation contained in the record (See R. p. 28, Stip. p. 22). Such delayed proceedings by purported creditors could serve only to keep an alleged bankrupt for years in possession of property to which he and they have no right.

This farm was listed as having a value of $8,300.00. (See R. p. 3). On April 19, 1933, when creditor first filed under Sec. 75, the farm had been foreclosed and a Sheriff's certificate of sale issued to a former mortgagee who had bid in the property under the mortgage for its claim of $13,100.40. The property was never redeemed so that it passed under this sale. The amount of this encumbrance alone was substantially more than the value of the property.

The property, if it had been taken under the Bankruptcy Act, could be taken only subject to all existing liens.

Thompson vs. Fairbanks,
196 U. S. 516, 25 S. Ct. 306, 49 L. Ed. 577.

The Bankrupt had lost this property and the bankruptcy court could not acquire jurisdiction of it, but only of such property rights as the bankrupt had.

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 82 L. Ed. 1490.

PROPERTY ACQUIRED AFTER PETITION FILED.

The Rural Rehabilitation Director for Utah, then attempted to assist the debtor to purchase again this farm by the use of the certificates of the Building and Loan Association which had foreclosed and acquired the property for the amount of its debt, $13,100.40, and by purchasing its certificates at a reduced price and exchanging them at their face. The Rehabilitation Director advanced $3,600.00 for this purpose, for which he later took a mortgage. The property was purchased in the name of the debtor December 28, 1935, and after the debtor was out of bankruptcy. In order to clear the title the debtor at that time borrowed from the Davis County Bank, $5,000.00 which was used to clear the title on this repurchase, by the payment of delinquent taxes, etc. and liens against the water stock and other judgment liens. (See R. p. 27). The taxes for 1937, 1938 and 1939 were allowed to become delinquent again, so that these new purchase price liens and taxes again exceeded the value of this farm. It is obvious that there was never anything for these unsecured creditors and that they could in no way be here prejudiced. The Court will consider only errors which are prejudicial.

Drybrough vs. Ware, 111 Fed. (2d) 548 at 550.

Even if bankrupt had been in bankruptcy when this property was acquired, it would not be subject to creditors claims in such proceeding because it was acquired after the petition was filed from funds furnished afterward.

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 82 L. Ed. 1490.

PROPERTY WAS AGAIN LEGALLY FORECLOSED.

Thereafter and while the petitioners claim the debtor was in bankruptcy, the Court authorized the foreclosure of the rural Rehabilitation Director's mortgage which had then been transferred to the name of William J. Thayne, the Rehabilitation Director. (See R. p. 11). This mortgage was foreclosed subject to the Davis County Bank mortgage under this authority. (See R. p. 28). This foreclosure of this property was valid and effective.

Union Joint Stock Bank vs. Byerly, supra;

Borchard vs. California Bank,
107 Fed. (2d) 96 (9 C. C.);

Wright vs. Vinton Branch of Mountain Trust Bank, 300 U. S. 440 at 463, 57 S. Ct. 556 at 562, 81 L. Ed. 736, 112 A. L. R. 1455.

PETITIONING CREDITORS NOT PREJUDICED.

These creditors although admitting notice of the filing under 75, R. p. 15 never filed any claims and did nothing for seven years. They are claiming merely that they did not get notice of an order of dismissal which the Circuit Court of Appeals has held was made at the time the creditor was not in bankruptcy at all. The District Court, however, in considering their petitions and prior to the order of April 1, 1940 denying them, ordered the appearance of all claimants and creditors and everyone having any interest and they were noticed. (R. p. 16-18). This District Court was one exercising equity jurisdiction,

Pepper vs. Litton,
308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281,

and could and did therefore review this matter at a subsequent time upon full notice,

Kenyon v. Chain O'Mines, Inc.,
107 Fed. (2d) 160.

The Court then decided adversely to the creditor all the matters contained in the Findings as reasons for the Court's refusal to reopen the matter including the order of December

10, 1938 and the matter of the creditors laches. So, for this reason, also, petitioners were not prejudiced even if Bankrupt had been still under the Court's jurisdiction.

Leinweber vs. Federal Land Bank of St. Louis,
95 Fed. (2d) 240 (7 C. C.).

This case also states that creditors cannot reinstate a debtor over his objection.

We point out, also, that under Subdivision 4 of General Order No. 50 in bankruptcy, even if the bankrupt had remained under 75, that since the Conciliation Commissioner reported April 19, 1934 to the District Court that "no agreement was reached." (R. p. 6). And again reported February 26, 1937 recommending the dismissal of the proceedings (R. p. 10, 26, Finding 6), that the order of December 10, 1938 could be properly entered without notice. This General Order Provision is entirely independent of the proceedings referred to in the statutes cited by petitioner and reads:

> "If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the first meeting, the Conciliation Commission shall, unless the Judge for cause shown, has permitted a further extension, forthwith report the facts to the Judge who shall thereupon dismiss the proceedings."

This brief statement, we believe sufficiently indicates that there is no ground or reason for the granting of a Writ of Certiorari in this case, that the only matter suggested as a reason is not at all involved, and if it were involved and decided, the court would be deciding a purely moot issue.

Respectfully submitted,

JOHN JENSEN,
Counsel for Respondent.

A. M. CHENEY,
KARL V. KING,
PAUL B. CANNON,
H. L. MULLINER,
Of Counsel.